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IN THE
Supreme Court of the United States

RICHARD L. MATHIAS, ET AL.,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF BELLSOUTH, VERIZON, AND UNITED STATES TELECOM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT ILLINOIS BELL TELEPHONE COMPANY

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, *amici* BellSouth Corporation ("BellSouth"), Verizon Communications Inc. ("Verizon"), and the United States Telecom Association ("USTA") state the following:

BellSouth Corporation. BellSouth has no parent company, and no publicly owned company owns 10% or more of its stock.

Verizon Communications Inc. Verizon has no parent company, and no publicly held company owns 10% or more of its stock.

United States Telecom Association. USTA is a non-profit trade association. USTA has no parent companies, subsidiaries, or affiliates with respect to which disclosure is required by Rule 29.6.

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INTEREST OF *AMICI CURIAE* [1]

BellSouth Corporation ("BellSouth") and Verizon Communications Inc. ("Verizon") are incumbent local exchange carriers ("LECs"), and the United States Telecom Association ("USTA") is a trade association representing the interests of incumbent LECs. Incumbent LECs are subject to unprecedented obligations under the Telecommunications Act of 1996 ("1996 Act"). Those obligations are implemented through interconnection agreements that have been held to be subject to the interpretation and enforcement authority of state public utility commissions like the Illinois Commerce Commission ("ICC"), whose members are the

[1] The parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

petitioners in this case. Because many of the most significant regulatory determinations concerning the duties imposed under the 1996 Act take place in cases involving the interpretation and enforcement of existing agreements, it is of the utmost importance to incumbent LECs that federal courts are able to ensure that state commissions are implementing the 1996 Act uniformly and in accord with the expressed intent of Congress. This will be possible only if state commission interpretation and enforcement decisions are subject to federal court review, as Congress intended.

SUMMARY OF ARGUMENT

I. The 1996 Act confers federal jurisdiction "[i]n *any* case in which a State commission makes a determination under this section." 47 U.S.C. § 252(e)(6) (emphasis added). Because state commissions derive their authority over interconnection agreements from § 252, their decisions interpreting or enforcing such agreements necessarily constitute determinations under § 252 that are subject to federal district court review under § 252(e)(6).

A. The ICC itself recognized that the source of its "jurisdiction . . . to interpret and enforce the terms of interconnection agreements" was, at least in part, "Section 252 of the Telecommunications Act of 1996." J.A. 112a. That is undeniably true: under the regulatory scheme of the 1996 Act, the interconnection agreement at issue here is tantamount to a federal tariff, subject to approval by the ICC under authority delegated by Congress and according to federal standards. Under this Court's precedents, "the question of tariff construction . . . was within the exclusive primary jurisdiction" of the ICC by virtue of the delegation of authority in § 252. *United States v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956); *see Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Accordingly, the determination at issue here was "under" § 252, and

Congress granted federal courts jurisdiction to review such determinations.

B. If there were any ambiguity on this point, it has been resolved by the Federal Communications Commission ("FCC"), the federal agency responsible for implementing the requirements of the 1996 Act. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In a directly analogous case, the FCC ruled that the refusal of the Virginia State Corporation Commission ("SCC") to "interpret and enforce . . . interconnection agreements" constituted a "'fail[ure] to act to carry out its responsibility' *under section 252*." Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000) ("*Starpower Preemption Order*") (quoting 47 U.S.C. § 252(e)(5)) (emphasis added).

II. A. This Court has made clear that Congress may, in the exercise of its Article I powers, condition a grant of authority to a State on the State's waiver of immunity from suit in federal court. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)). That principle controls here: Congress has validly conditioned the exercise of federal authority on consent to suit in federal court. The language of § 252(e)(6) makes unmistakably clear that, if a state commission exercises authority under § 252, a federal court has jurisdiction to review that determination. As this Court noted in *AT&T*, "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." 525 U.S. at 378 n.6. Accordingly, the ICC waived its Eleventh Amendment immunity in this case

when it knowingly exercised jurisdiction "under . . . Section 252." J.A. 112a.

The reference in § 252(e)(6) to federal courts' authority "to determine whether the agreement or statement meets the requirements of" §§ 251 and 252 does not limit federal courts' jurisdiction in a case like this one. The quoted language refers not to the circumstances in which a federal court has jurisdiction but instead to the scope of federal court review. The review sought here, in any event, fits comfortably within that language.

B. The nearly uniform holdings of the federal courts of appeals that a suit like this one is a straightforward *Ex parte Young* action are correct. Contrary to petitioners' claim, sovereign immunity does not prevent a court in equity from hearing an action to enjoin an official from acting on an agency's unlawful adjudicatory order. *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 185 (1938); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Nor is there any indication in the text of the 1996 Act that Congress intended to limit the authority of federal courts to determine whether a state commission has implemented the 1996 Act in a manner consistent with federal law. An *Ex parte Young* suit is designed precisely for that purpose.

ARGUMENT

I. A STATE COMMISSION'S INTERPRETATION OR ENFORCEMENT OF AN EXISTING INTERCONNECTION AGREEMENT IS A "DETERMINATION UNDER" SECTION 252

Section 252(e)(6) provides that, "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court." 47 U.S.C. § 252(e)(6). This language is unambiguous: Congress conferred jurisdiction

on federal district courts in "*any case*" in which a state commission makes a determination under § 252. Because an interpretation or enforcement decision of a state commission is a determination "under" § 252, a district court has subject matter jurisdiction under § 252(e)(6) to review the decision.

A. Under the 1996 Act's Regulatory Scheme, a State Commission's Authority To Resolve Disputes over Interconnection Agreements Derives from Section 252

The language of the statute, read in light of established law governing regulatory statutes like the 1996 Act, makes plain that the ICC's determination was made "under" § 252. As this Court observed in *Ardestani v. INS*, 502 U.S. 129 (1991), "'under' means 'subject [or pursuant] to' or 'by reason of the authority of.'" *Id.* at 135 (citation omitted; alteration in original). The determination at issue here meets this definition because the ICC did act pursuant to, and by reason of the authority of, § 252. Under § 252, Congress expressly granted state commissions the power to arbitrate and to approve (or reject) interconnection agreements according to federal standards. As the Seventh Circuit and three other courts of appeals have recognized, that power to approve or reject interconnection agreements carries with it "the authority to interpret and enforce" the terms of such agreements. *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001); *see also Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th

Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000).[2]

Petitioners and their *amici* believe that these precedents are wrong and that the only determinations that are "under" § 252 are decisions "to approve agreements . . . and decisions to reject or modify agreements." New Jersey, *et al.*, Amicus Br. at 7; *see* Pet'rs Br. at 18-19. That argument is belied, however, by the very language of the ICC determination at issue. Ameritech had challenged the authority of the ICC to decide a dispute that concerned jurisdictionally interstate traffic. The ICC rejected that jurisdictional challenge precisely because, in its view, its authority over the dispute had been delegated by Congress: the ICC specifically held that its jurisdiction "to interpret and enforce the terms of interconnection agreements" arose "under the Public Utilities Act *and Section 252 of the Telecommunications Act of 1996*." J.A. 112a (emphasis added).[3]

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[2] For this reason, it is far from clear that a state court would have jurisdiction to review the determination at issue here. Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement." 47 U.S.C. § 252(e)(4). The 1996 Act uses the same language in *granting authority* to state commissions that it uses in *excluding review* by state courts: state commissions have authority to "approve or reject" an agreement (*id.* § 252(e)(1)). If that language gives state commissions the power to rule here, then the same language in § 252(e)(4) must be read to exclude state court jurisdiction in this circumstance as well.

[3] The fact that the ICC's jurisdiction over the dispute was also "under" the Illinois Public Utilities Act is no obstacle to finding that its jurisdiction was "under" § 252. The 1996 Act confers jurisdiction on state commissions, defined as "the commission, board, or official . . . which *under the laws of any State* has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41) (emphasis added). The ICC was able to exercise the authority delegated by federal law only because of its authority under state law, and therefore the ICC properly relied on both federal and state law as the source of its jurisdiction below.

The ICC's decision and the decisions of the Fifth, Seventh, Eighth, and Tenth Circuits are correct on this point, and petitioners' brief is wrong. When a federal regulatory statute delegates "law-making power over certain aspects of commercial relations" to an administrative agency, it is that agency that must make determinations as to issues that implicate the "expert administration of the regulatory scheme laid down" by the statute. *Western Pac.*, 352 U.S. at 65 (internal quotation marks omitted). The paradigm application of that principle is in regimes like the 1996 Act involving common carrier regulation and filed tariffs.[4] In such regimes, where an agency is entrusted with the power to *set* the terms of the tariff to ensure that such terms are just, reasonable, and nondiscriminatory (for example), the agency must likewise have an opportunity to *construe* the terms of the tariff when such construction is in dispute. *See Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922).

Preliminary resort to the responsible administrative agency is required whenever a dispute "raises issues of . . . policy which ought to be considered by the [agency] in the interests of a uniform and expert administration of the regulatory scheme." *Western Pac.*, 352 U.S. at 65. In *Western Pacific*, this Court held that it was for the relevant federal agency to determine, in the first instance, whether steel casings filled with napalm gel qualified as "incendiary bombs" in light of the considerations behind the category established in the tariff. *Id.* at 67. Here, that rule mandates that the ICC — the agency with the authority to ensure that the *terms* of the parties' agreement comply with the substantive standards of the 1996 Act — likewise have authority to ensure, in the first instance, that such agreements are

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[4] As Verizon explains at length in its Petitioner's Brief in Nos. 00-1531 and 00-1711, interconnection agreements operate as federal tariffs.

implemented in accordance with those federal standards. In this case, for example, determining the scope of the parties' obligation to pay reciprocal compensation on Internet-bound traffic required application of a then-unsettled legal standard to complicated, technical facts, a task that necessarily implicated the ICC's administrative expertise.[5]

This understanding of state commission authority under § 252 gives effect to congressional intent as expressed in the language and structure of the 1996 Act. The type of policy determination that Congress most clearly intended for state commissions to make — and for federal courts to review — may arise either before or after approval of an agreement. *See Western Pac.*, 352 U.S. at 68 (noting "the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied"). For example, parties may choose to adopt terms as to some issues that simply track the requirements of the Act and the FCC's regulations. In those circumstances, a dispute over the requirements of the agreement is equivalent to a dispute over the terms of the Act.

If such a dispute arises during the parties' negotiations, they may submit it to the state commission for arbitrated resolution. No one denies that the resulting state commission determination would be reviewable under § 252(e)(6). The outcome should be no different merely because the dispute lies dormant at the time the parties negotiate their agreement and does not come up until later, when the state commission is asked to interpret or enforce the agreement.

This case provides an apt illustration. The parties adopted reciprocal-compensation provisions that track

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[5] That the ICC erred does not detract from the general point. Instead, it simply emphasizes the significance of judicial review on the record of each of the ICC's determinations.

the requirements of the 1996 Act. At the time of adoption, the parties apparently did not specifically discuss the application of those provisions to Internet-bound traffic. Had the dispute arisen during the course of negotiations, the ICC would have arbitrated the issue and approved an agreement embodying its resolution of the disputed issue. Its determination would then have been subject to review under § 252(e)(6). To argue that Congress intended state commissions to make the necessary determination in one circumstance but not in the other, or that Congress intended federal courts to review such determinations in one circumstance but not in the other, not only misreads the language of the statute, but also attributes an absurd intention to Congress. Basic principles of statutory construction forbid that result. *See United States v. Brown*, 333 U.S. 18, 27 (1948); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

Nor is it surprising that the ICC was asked to resolve this issue only after the agreement was approved. In 1996, the proper treatment of Internet-bound traffic was a relatively insignificant issue. It was only when the volume of such traffic "exploded" that the issue took on real economic significance. Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, 2001 WL 431687, ¶ 19 & n.45 (rel. Apr. 27, 2001) (*"ISP Remand Order"*), *petitions for review pending*, Nos. 01-1218 *et al.* (D.C. Cir.). Nonetheless, the practical stakes in this dispute and others like it are enormous: Verizon alone was billed more than one *billion* dollars for Internet-bound calls in 2000; industry-wide, incumbent LECs have been forced to transfer many billions of dollars to their competitors. *Id.* ¶ 70

& n.132.[6] These transfers have "created severe market distortions," *id.* ¶ 76, discouraging the development of real competition and undermining the principal goal that the 1996 Act was designed to promote. The lawfulness of these transfers has almost invariably been determined in proceedings like the one on review. *Id.* ¶ 70 n.132. In the absence of federal judicial review, federal courts' ability to ensure that federal policy is vindicated would be severely curtailed.

B. The FCC Has Confirmed that State Commission Authority To Interpret and Enforce Interconnection Agreements Is Under Section 252

The text of the 1996 Act makes clear that state commissions derive their authority to interpret and enforce previously approved interconnection agreements. But even if there were some ambiguity on this score, the FCC has resolved the matter by authoritatively interpreting the statute to invest state commissions with precisely that power.

Under § 252(e)(5), "[i]f a State commission fails to act to carry out its responsibility *under this section* in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter." 47 U.S.C. § 252(e)(5) (emphasis added). The FCC was recently called upon to take action under § 252(e)(5) when the Virginia SCC declined to rule in an enforcement dispute between a competitive LEC ("CLEC") and Verizon concerning the same substantive issue presented in this case — reciprocal compensation for

[6] Because Internet-bound traffic — and the reciprocal-compensation obligations that such traffic generates under the ICC's order — is "one-way," CLECs have been able to engage in "regulatory arbitrage" by "target[ing] ISP customers" solely "to share in the reciprocal compensation windfall." *ISP Remand Order* ¶¶ 69, 70, 74.

Internet-bound traffic. *See Starpower Preemption Order*, 15 FCC Rcd at 11278, ¶ 4 & n.7.

After the Virginia SCC refused to act, the CLEC filed a petition with the FCC under § 252(e)(5) asking it to assume the state commission's responsibility and resolve the dispute. The FCC granted the petition, holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252." *Id.* at 11279, ¶ 6.

The FCC's reading of the statute is the only one consistent with the statute's language. If there were any ambiguity, however, the Court would owe *Chevron* deference to the FCC's construction of the Act. *See AT&T*, 525 U.S. at 397.[7] Accordingly, the *Starpower Preemption Order* strongly supports affirmance on the first question presented: an action interpreting or enforcing an interconnection agreement is a determination under § 252 and therefore subject to federal district court review under § 252(e)(6).

[7] The Fourth Circuit has suggested that the FCC's ruling "does not bear on" the proper construction of § 252(e)(6), because that ruling "interprets the meaning of State commission 'responsibilities' under § 252 in the context of a State commission's failure to take action, rather than in the context of State commission 'determinations' which are reviewable in federal court under § 252(e)(6)." *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 303 n.6 (4th Cir.), *cert. granted in part sub nom. Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland*, 121 S. Ct. 2548 (2001) (Nos. 00-1531 & 00-1711). That distinction makes no sense: if a matter or proceeding is "under" § 252, then surely a state commission's determination in such a proceeding is likewise "under" § 252. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).

II. FEDERAL COURT JURISDICTION OVER CLAIMS UNDER SECTION 252(e)(6) IS CONSISTENT WITH THE ELEVENTH AMENDMENT

The Eleventh Amendment affirms that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). Consistent with that principle, "a State may waive its sovereign immunity by consenting to suit." *College Savings Bank*, 527 U.S. at 670. In addition, under this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), when a suit asserts that a state official's action constitutes an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective, "the suit '[is] not a suit against a State'" and the Eleventh Amendment is not implicated. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 292 (1997) (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and concurring in the judgment) (quoting *Ex parte Young*, 209 U.S. at 154); *see also id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

Here, the ICC waived its sovereign immunity by exercising its jurisdiction under § 252 to interpret and enforce an interconnection agreement with full knowledge that § 252(e)(6) authorizes suit in federal court in any case in which a party is aggrieved by such a determination under § 252. Moreover, even if the ICC had not waived its immunity, an *Ex parte Young* suit is available in these circumstances to enforce compliance with federal law. Accordingly, the Eleventh Amendment poses no bar to an action under § 252(e)(6).

A. The State Waived Its Immunity by Exercising the Conditional Authority Granted Under the 1996 Act

The United States may secure a State's consent to suit in federal court if it satisfies two requirements. First, it must make such consent a condition to the exercise of authority validly offered to the States. *See Petty*, 359 U.S. at 281-82. Second, Congress must "manifest[] a clear intent to condition" the State's exercise of authority "on a State's consent to waive its constitutional immunity." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). Both requirements are met here.

1. In *College Savings Bank*, the Court rejected the constructive waiver doctrine of *Parden v. Terminal Railway*, 377 U.S. 184 (1964). Under *Parden*, Congress could lawfully condition a State's ability to engage in an activity for which no congressional authorization is otherwise necessary — in *Parden*, running a railroad — on the State's consent to waive its Eleventh Amendment immunity. *See id.* at 192. *College Savings Bank* overruled *Parden* and established that, when a State's only alternative to submitting to federal court jurisdiction is to abstain from a lawful activity *in which the State could engage without federal permission*, there can be no waiver: "the voluntariness of waiver [is] destroyed . . . when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." 527 U.S. at 687.

Crucially, however, the Court made clear that its holding was limited to "*Parden*-style waivers," which are "*fundamentally different*" from those involved in cases such as *Petty*. *Id.* at 681, 686 (emphasis added). In *Petty*, the Court held that Congress may lawfully predicate the approval of an interstate compact on a waiver of immunity to federal court suit. *See* 359 U.S. at 281-82 ("States who are parties to the compact by

accepting it and acting under it assume the conditions that Congress under the Constitution attached."); *College Savings Bank*, 527 U.S. at 686 (describing *Petty* as holding that "a bistate commission which had been created pursuant to an interstate compact . . . had consented to suit by reason of a suability provision attached to the congressional approval of the compact").

Because States cannot form an interstate compact without obtaining express authority from Congress (*see Petty*, 359 U.S. at 282 n.7), Congress was not "exclu[ding]" the States "from otherwise permissible activity" in conditioning approval of the compact on consent to suit. *College Savings Bank*, 527 U.S. at 687. Instead, Congress was merely withholding a grant of authority — a "gift or gratuity" — to which the States had no preexisting right and could not have obtained without congressional action. *Id.* Indeed, even the dissenting Justices in *Petty* recognized that there was "[n]o doubt Congress could have insisted upon a provision waiving immunity from suit in the federal courts as the price of obtaining its consent to the Compact." 359 U.S. at 285 (Frankfurter, J., dissenting).

This Court has likewise recognized that the lawfulness of *Petty*-style waivers finds significant support in Spending Clause jurisprudence, under which Congress may condition a State's receipt of federal funds on waiver of some right. *See College Savings Bank*, 527 U.S. at 686. For instance, Congress may lawfully condition States' receipt of federal highway funds on adoption of a minimum drinking age of 21. *See South Dakota v. Dole*, 483 U.S. 203 (1987); *see also College Savings Bank*, 527 U.S. at 686 (*Dole* establishes that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions"). As in *Petty*, the States

in these cases have no preexisting right to federal funds: "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Id.* at 686-87.

The 1996 Act is directly analogous to the situation in *Petty* and the Spending Clause cases. States have no preexisting right to implement a federal statute. Rather, it is wholly within the discretion of Congress to determine whether States will be invited to participate in the implementation of a federal program. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (discussing Congress's authority to create such schemes of "cooperative federalism"). Accordingly, just as in *Petty* and the Spending Clause cases, the conduct at issue here would not be permissible without congressional action, and it is perfectly constitutional for Congress to condition that grant of new authority on the State entities' consent to be sued in federal court, as it has done in § 252(e)(6).

Petitioners and their *amici* argue that the conditional grant of authority here was unconstitutional because it forces the States to choose between "abandon[ing] regulation" of local telephone companies or consenting to suit in federal court. Council of State Gov'ts, *et al.*, Amicus Br. at 19; *see* Pet'rs Br. at 36-40. That argument misapprehends the 1996 Act. The statute in no way requires States to waive Eleventh Amendment immunity as a condition of continuing to apply existing state regulation to local telecommunications. The Act requires waiver only if the State wishes to exercise *federal authority* to oversee new *federal* requirements for access by competitors to incumbents' local networks.[8] At the same time, the statute expressly

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[8] The suggestion that this offer of authority is not a "gratuity" because the performance of federal regulatory functions by the State actually saves the United States the cost of "setting up . . . local field

preserves *state* authority over local telecommunications, so long as state regulations are "not inconsistent" with the new federal regime. 47 U.S.C. § 261(b); *see also id.* §§ 253(b), 261(c).

Moreover, insofar as the 1996 Act displaces inconsistent state regulations, it does so *irrespective of whether the State waives Eleventh Amendment immunity*. The federal standards enacted by the 1996 Act preempt conflicting state rules to the same extent regardless of whether a State chooses to waive its immunity and implement the federal standards or to retain its immunity and allow the FCC to undertake that role. *See AT&T*, 525 U.S. at 378 n.6 ("[T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."). This preemption is entirely within Congress's constitutional authority. *See FERC v. Mississippi*, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities.").

Indeed, this Court rejected a closely related argument in the Tenth Amendment context in *Hodel*. The argument there was that "the threat of federal usurpation of their regulatory roles coerces the States into enforcing the Surface Mining Act." 452 U.S. at 289. The Court emphatically rejected the claim that this

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office[s]" (Council of State Gov'ts, *et al.*, Amicus Br. at 16) misunderstands the constitutional test. The offer of authority is a gratuity because Congress is in no way bound to permit the States to exercise that authority. If the States consider the offer unattractive, they can reject it; indeed, at least one State has. *See* Memorandum Opinion and Order, *Cox Virginia Telecom, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 17958 (Chief, CCB 2000).

raised any constitutional problem. "A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Id.* at 290. "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Id.* Accordingly, where Congress chooses "to allow the States a regulatory role" in the federal scheme, this does not render the statute "constitutionally suspect." *Id.*

Just as Congress presumably could not *require* state commissions to administer the 1996 Act, *see Printz v. United States*, 521 U.S. 898 (1997), Congress cannot *require* state commissions to waive their Eleventh Amendment immunity. But just as Congress may indisputably make adherence to federal standards a condition of a State's participation in a federal regulatory scheme — even in an area of traditional state concern — Congress may likewise make consent to suit in federal court a condition of the State's exercise of federal authority under the 1996 Act. Such a condition does not constitute improper coercion. It gives the States a genuine choice, a choice that Congress is fully permitted to offer in exercising its undisputed authority under the Commerce Clause.

2. Petitioners argue that, even if Congress *could* condition States' participation in the 1996 Act's regulatory scheme on their consent to suit in federal court, Congress failed to make that condition sufficiently clear in the text of the 1996 Act. As noted above, however, the text of § 252(e)(6) establishes "by the most express language" (*Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal quotation marks omitted)) that any party aggrieved by a state commission determina-

tion under § 252 may bring an action in *federal* district court. 47 U.S.C. § 252(e)(6).

Petitioners argue that § 252(e)(6) "does not even plainly state that it covers decisions on issues beyond the agreement approval stage." Pet'rs Br. at 30. But, as we explained above, the ICC was able to interpret and enforce the 1996 Act interconnection agreement between the parties only by virtue of the delegation of authority to the ICC under § 252. And the ICC itself *recognized* that it was acting "under . . . Section 252." J.A. 112a. Petitioners therefore cannot plausibly claim that Congress failed to make clear that determinations made in the course of interpreting and enforcing interconnection agreements would be subject to review in federal court.

Petitioners also argue that, because § 252(e)(6) "allows federal actions only 'to determine whether the agreement or statement meets the requirements of'" §§ 251 and 252, "[r]eview of whether the content of an agreement complies with those requirements should occur at the time the agreement is approved." Pet'rs Br. at 19 (quoting 47 U.S.C. § 252(e)(6)) (footnote omitted). The quoted statutory language, however, refers not to the circumstances in which a federal court has *jurisdiction* but instead to the *scope* of review by a court that does have jurisdiction. Uncertainty about the *nature* of the proceedings in federal court cannot cast doubt on the fact that such proceedings are authorized.

Just as important, the review sought here fits comfortably within the scope of review described in § 252(e)(6). When a state commission resolves a dispute over the meaning of an interconnection agreement, it effectively sets the terms that will govern the incumbent's obligations to all CLECs that have chosen — or that may choose in the future — to avail themselves of the agreement's terms. If the agreement *as construed* does not "meet[] the requirements" of §§ 251

and 252, then the state commission's decision must be reversed. And among the requirements of §§ 251 and 252 is that the terms established through negotiation must be treated as "binding . . . without regard to the standards set forth" in § 251(b) and (c). 47 U.S.C. § 252(a)(1). Accordingly, when a state commission imposes terms that are inconsistent with the parties' negotiated terms, the resulting "agreement" no longer "meets the requirements" of §§ 251 and 252.

Finally, petitioners and their *amici* argue that § 252(e)(6) does not make clear that a state commission must be made a party in an action under § 252(e)(6); instead, they suggest that a § 252(e)(6) action could proceed between the private parties alone. *See* Pet'rs Br. at 30; Council of State Gov'ts, *et al.*, Amicus Br. at 12.[9] That argument is a curious one for petitioners to make because, if it were correct, it would — at the very most — alter the caption on the case; it would not deprive the federal district courts of jurisdiction.

If state commissions are indispensable parties to an action for review of a state commission determination, then Congress's intention to elicit the States' consent to suit in federal court is the "overwhelming implication[] from the text." *Edelman*, 415 U.S. at 673 (internal quotation marks omitted). If a "party aggrieved" by a "State commission . . . determination under" § 252 (47 U.S.C. § 252(e)(6)) may obtain review only by proceeding against the State, a state commission that makes a determination under § 252 necessarily does so with full knowledge that the action for review of that determination would be brought against it in federal court. By exercising authority under § 252, the State accepts a

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[9] This argument is unique among those deployed by petitioners in that it would apply to state commission determinations involving initial approval or rejection decisions as well as subsequent interpretation and enforcement decisions.

bargain that includes consent to suit in federal court in exchange for the exercise of authority over telecommunications competition under the 1996 Act. *Cf. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 121 S. Ct. 1589, 1596 (2001) ("The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed.") (alterations in original, internal quotation marks omitted).[10]

On the other hand, if a § 252(e)(6) action can proceed without the State's presence and, for that reason, § 252(e)(6) is not sufficiently unequivocal to elicit a waiver of the State's immunity, at most that would argue in favor of barring actions against state commissions as named parties.[11] It would not support dismissal of the entire case if otherwise properly filed in federal court under § 252(e)(6). For this reason, it is a matter of relative indifference to *amici* if the Court were to rule that an action under § 252(e)(6) should not proceed against the State itself, so long as the jurisdiction of federal courts to review state commission determinations under § 252 is preserved.

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[10] If it is correct that the State is an indispensable party, then the State is not among different classes of potential defendants to which Congress might have been referring. Rather, *every* case under § 252(e)(6) must proceed against the state commission. *Cf. Atascadero*, 473 U.S. at 245-46 (holding that reference to "any recipient of Federal assistance" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" because the statutory language could refer to "other class[es] of recipients of federal aid").

[11] A suit could still proceed against the state *commissioners* under *Ex parte Young*, even if the State did not waive its immunity. The issue of indispensability would not arise, because the commissioners would certainly be proper parties, even if not indispensable.

B. Exercise of Federal Subject Matter Jurisdiction Was Appropriate Under *Ex parte Young*

In its complaint in district court, Ameritech alleged that the ICC determination at issue violates federal law; it sought an injunction restraining the members of the ICC from taking action to enforce the ICC's order. Because Ameritech named the ICC's members, the Eleventh Amendment poses no obstacle to the suit: a complaint seeking prospective injunctive relief against a state officer to restrain alleged violations of federal law is a paradigm *Ex parte Young* action.

Petitioners and their *amici* argue that *Ex parte Young* is inapplicable when the action challenges the lawfulness of an adjudicatory order. But that argument fundamentally misconceives *Ex parte Young*.

1. When a suit is brought "against state officials, a question arises as to whether that suit is a suit against the State itself." *Pennhurst*, 465 U.S. at 101. Under this Court's decision in *Ex parte Young*, when a suit asserts that a state official's action constitutes an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective, "the suit '[is] not a suit against a State.'" *Coeur d'Alene*, 521 U.S. at 292 (O'Connor, J., concurring) (quoting *Ex parte Young*, 209 U.S. at 154). "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

The claims that Ameritech brought against the members of the ICC squarely fit this definition. The suit was against the members of the ICC, not the State itself. *Cf. Cory v. White*, 457 U.S. 85, 91 (1982) (holding that a suit against the State itself as a named

defendant is barred). The suit alleged an ongoing violation of federal law — that is, a state commission order requiring Ameritech to pay (and authorizing CLECs to retain) reciprocal compensation in violation of federal law. And the suit seeks purely prospective relief — an injunction barring enforcement of the ICC's order. There will be no effect at all on the State's treasury. *Cf. Edelman*, 415 U.S. at 668 (barring forms of relief that "require[] payment of state funds . . . as a form of compensation").

Under the rule articulated by seven members of this Court in *Coeur d'Alene*, therefore, *Ex parte Young* applies here. That conclusion fits easily within this Court's long tradition of non-statutory review of federal and state administrative action through the medium of suits for injunctive relief against executive branch officials. *Ex parte Young* itself was an action to enjoin the attorney general of Minnesota from enforcing an order of the state railroad commission requiring a reduction in rates. 209 U.S. at 127, 129-30. The cases in which state commissioners have been held to be subject to the jurisdiction of federal courts in cases like this one are legion. *See, e.g., State Corp. Comm'n v. Wichita Gas Co.*, 290 U.S. 561 (1934); *Railroad & Warehouse Comm'n v. Duluth Street Ry.*, 273 U.S. 625 (1927); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196 (1924); *Prendergast v. New York Tel. Co.*, 262 U.S. 43 (1923); *Smyth v. Ames*, 169 U.S. 466 (1898).

2. Petitioners argue that the ICC does not "violate federal law" when it misapplies substantive federal law. *See* Pet'rs Br. at 42. According to petitioners, the holding of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), a case involving the scope of the United States' sovereign immunity, dictates that a merely "incorrect" decision on a matter of federal law cannot provide grounds for relief against a state officer. Pet'rs Br. at 44. In a similar vein, the Council of State

Governments, *et al.*, argue that an equitable action against a state officer is *never* available to secure review of an agency's adjudicatory order. Both arguments misapprehend the nature of the action below and are inconsistent with *Ex parte Young* and this Court's sovereign immunity decisions.

It is simply wrong to portray this suit as an effort to secure an injunction against the ICC acting in its quasi-judicial capacity. Ameritech seeks an injunction against *enforcement* of the ICC's order, an order that is the result of a proceeding that has been completed. Accordingly, Ameritech is attempting neither to "'restrain [the ICC] from acting'" in its adjudicatory capacity (*cf.* Council of State Gov'ts, *et al.*, Amicus Br. at 21 (quoting *Ex parte Young*, 209 U.S. at 163)) nor to enjoin "'state court proceedings'" (*cf. id.* at 28 (quoting *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 294 (1970))).[12] There is no dispute that the ICC exercises quasi-legislative, quasi-judicial, *and* executive functions. The relief that Ameritech seeks directly implicates only the commissioners' executive function. This case does not remotely present the question whether a federal district court could *enjoin* an interpretation or enforcement proceeding under the 1996 Act.

Rather, the question is whether a suit against an executive officer to enjoin enforcement of an agency order is an appropriate method for obtaining review of an underlying administrative adjudication. This Court's precedents answer that question in the affir-

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[12] The suggestion that an injunction against enforcement would "require a federal court to . . . enjoin further proceedings in the state courts" (Council of State Gov'ts, *et al.*, Amicus Br. at 28) is likewise incorrect. The judgment of the federal court would preclude relitigation of any claims properly before it, but a state court that dismisses a suit under *res judicata* principles is doing its job; it is not restrained from doing it. *See* U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause).

mative because such a suit does not constitute a suit against the sovereign.[13] For example, in *Shields v. Utah Idaho Central Railroad*, the railroad sued the United States Attorney to enjoin a prosecution for a violation of the Railway Labor Act. 305 U.S. at 179-80. That Act charged the Interstate Commerce Commission with determining "whether a particular railroad fell within" the categories of railroads subject to the Act; the Act did not provide any method for obtaining review of that determination. *Id.* at 180, 183. After holding that Congress could appropriately delegate such a function to the Interstate Commerce Commission, the Court further determined that an action to restrain execution of the Interstate Commerce Commission's order was the appropriate method of obtaining judicial review of the determination itself. As the Court held, "[e]quity jurisdiction may be invoked when it is essential to the protection of the rights asserted." *Id.* at 183. "[R]espondent was entitled to resort to equity in order to obtain a judicial review of the questions of the

[13] The principle that the sovereign immunity of the United States poses no bar to the review of an administrative adjudication applies equally to state determinations. *See Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (holding that the principle that a suit against an "officer acting in excess of his authority or under an authority not validly conferred" is not a suit against the United States is "equally applicable" to federal and state officers); *Tindal v. Wesley*, 167 U.S. 204, 213 (1897) ("[W]hether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."); *see also Coeur d'Alene*, 521 U.S. at 292 (O'Connor, J., concurring) (relying on *United States v. Lee*, 106 U.S. 196 (1882), a suit against federal officers, to construe the scope of *Ex parte Young*). *Ex parte Young* itself relied on cases involving actions against the United States and individual States in determining the scope of sovereign immunity under the Eleventh Amendment. Petitioners tacitly acknowledge this principle by relying prominently on *Larson v. Domestic & Foreign Commerce*, a case involving federal, not state, sovereign immunity.

validity and effect of the Commission's determination purporting to fix its status." *Id.* at 184.

The Court reached the same conclusion in *American School of Magnetic Healing v. McAnnulty*. There, the Postmaster General had determined that certain letters were "a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises." 187 U.S. at 98. The plaintiff brought an action to enjoin the postmaster in Missouri from enforcing the order, in part on the ground that the Postmaster General's determination that the materials were fraudulent was incorrect. *Id.* at 101. The lower court dismissed the suit; this Court reversed. The Court held that the validity of the Postmaster General's determination was a legal question appropriate for review in court. "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *Id.* at 110.

That conclusion controls this case. If the ICC's order is invalid, as Ameritech has alleged, then an action to enforce it would be "unauthorized by any law." The effect on Ameritech's rights is dramatic, for the ICC has imposed an obligation to transfer tens of millions of dollars for the exclusive benefit of Ameritech's competitors. If that result is unlawful under the 1996 Act — and Ameritech alleges that it is — *Ex parte Young* guarantees Ameritech a federal forum to vindicate its rights.

For related reasons, the Court's analysis in *Larson* establishes that Ameritech's suit against the ICC commissioners may proceed. In that case, Congress had authorized a certain executive officer to sell surplus coal. The plaintiff sought to enjoin the sale of certain coal to a third party, alleging that the officer had contracted to sell the coal to the plaintiff. *See* 337

U.S. at 684. This Court ruled that the action should have been dismissed as a suit against the United States. In particular, the Court rejected the argument that "an officer given the power to make decisions is only given the power to make correct decisions." *Id.* at 695. "There is no warrant" for the contention that "his action . . . is beyond his authority and not the action of the sovereign" *as long as "the decision made by the officer does not relate to the terms of his statutory authority."* *Id.* (emphasis added). Because the officer, "like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with," his "action in so doing in this case was . . . within his authority even if . . . we assume that his construction was wrong." *Id.* at 703.

This case is different in at least two pivotal respects. First, it is clear from the 1996 Act itself that a claim that a state commission has misconstrued the parties' agreement inevitably *does* "relate to the terms of [its] statutory authority." *Id.* at 695. The purpose of state commission arbitration, approval, interpretation, and enforcement is to ensure that the terms governing the relationship between incumbent LECs and new market entrants "meet the requirements" of the 1996 Act, including the requirement that an interconnection agreement shall have "binding" effect (§ 252(a)(1)) and that the relationship between the parties shall be conducted "in accordance with the terms and conditions of the agreement" (§ 251(c)(2)(D), (c)(3)). 47 U.S.C. § 252(c); *see also id.* § 252(e)(2), (6). When a state commission misconstrues the terms of an interconnection agreement, it deprives that agreement of its binding effect and impermissibly alters the inter-carrier relationship. Such a determination therefore falls outside the scope of the state commission's statutory authorization;

indeed, it directly undermines a central statutory purpose.

Second, Ameritech maintains that the *order itself* is invalid as a matter of preemptive federal law. The order therefore confers on the commissioners no valid authority to enforce its dictates against Ameritech. In other words, Ameritech seeks "specific relief" from "action of an officer of the sovereign" that was "illegal" because the "exercise [of the officer's powers] in the particular case" would be contrary to binding federal law. *Larson*, 337 U.S. at 701-02. *Larson* specifically endorses injunctive relief in that circumstance. Indeed, as *Shields* establishes, an action against an officer seeking to enforce an adjudicatory order is the appropriate means to secure judicial review of that underlying order. In such circumstances, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (per curiam). Where an official has misconstrued governing law, "his actions would not constitute exercises of his administrative discretion," and "judicial relief from this illegality would be available." *Id.* at 582.

3. There is likewise no doubt that Ameritech has a valid basis for seeking to enjoin an ongoing violation of federal law. The order at issue requires Ameritech to "pay . . . reciprocal compensation for all calls . . . from its customers to [Internet service providers] that are the customers of the complainants." J.A. 123a. That order is lawful only to the extent that the ICC properly construed the interconnection agreement at issue, because § 252(a)(1) specifically provides that interconnection agreements like the one at issue here are "binding." 47 U.S.C. § 252(a)(1). Any action by the ICC to enforce an obligation contrary to the terms of an interconnection agreement would violate § 252(a)(1).

"A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual." *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 390 (1894). Federal courts have "jurisdiction to restrain their excessive and illegal acts." *Id.* at 391.

Moreover, because Ameritech's rights under its interconnection agreements are themselves federal rights, a state officer's effort to enforce an order that runs contrary to the terms of an interconnection agreement itself may be restrained as a violation of federal law. The Seventh Circuit mistakenly believed that whether the interconnection agreement at issue requires the payments ordered by the ICC is solely a matter of state contract law. Pet. App. 4a-5a. But, as Verizon has explained in its brief in the companion case, rights under an interconnection agreement are federal rights, and questions concerning the obligations they impose are federal matters. *See* Nos. 00-1531 & 00-1711 Verizon Br. at 20-29. Accordingly, an ICC order that is contrary to the terms of the parties' agreement would violate federal law for that reason alone.

4. Finally, petitioners briefly argue that, because § 252(e)(6) constitutes "'a detailed remedial scheme for the enforcement against a State of a statutorily-created right,'" Ameritech's suit may not proceed. Pet'rs Br. at 45 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996)). That argument misapplies *Seminole Tribe*.

First, petitioners' entire brief is premised on the argument that § 252(e)(6) prescribes no remedy at all for Ameritech's federal rights. One cannot coherently argue simultaneously that § 252(e)(6) does not even speak to Ameritech's claims *and* that § 252(e)(6) addresses those claims so specifically as to provide

evidence of Congress's intent affirmatively to preclude any alternative avenue of relief.[14]

Second, and more important, there is nothing about the relief that is available in an *Ex parte Young* suit that is inconsistent with or more far-reaching than the congressionally prescribed remedy in § 252(e)(6). On the contrary, the 1996 Act simply provides for judicial review and limits neither the remedies nor the sanctions available. Such suits are thus governed by the "general rule" under which, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992). An *Ex parte Young* suit would thus in no way expand the sanctions available under the 1996 Act. Indeed, a suit against a government agency pursuant to a valid waiver of sovereign immunity and an action for injunctive relief against an executive official are both long-established methods for securing judicial review of agency action. The circumstances here thus bear no meaningful resemblance to *Seminole Tribe*.

CONCLUSION

The Court should affirm the judgment of the court of appeals insofar as that court held that the district court had subject matter jurisdiction over this action under 47 U.S.C. § 252(e)(6) and that the Eleventh Amendment does not preclude the district court's exercise of that jurisdiction.

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[14] Indeed, as Verizon explains in its brief in the companion case, in the absence of affirmative evidence of congressional intent to foreclose judicial review, the presumption is that Congress intends for administrative action undertaken pursuant to a federal statute to be subject to judicial review.

Respectfully submitted,

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